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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1458

No. 79-1459

CHARLES G. RODMAN, as Trustee of the Estate of W.T. GRANT COMPANY, Bankrupt and MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Petitioners,

v.

ALTON RINIER, as Agent for Certain Employees of Bankrupt; ANSWERING EMPLOYEES OF BANKRUPT, LOCAL 807-IBT; RETAIL CLERKS INTERNATIONAL ASSOCIATION; and NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF RESPONDENT RETAIL CLERKS INTERNATIONAL ASSOCIATION IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the Second Circuit correctly decided that severance pay claims of employees terminated during the administration of the estate which, pursuant to a collective bargaining agreement, were calculated according to the total length of service to the bankrupt are to be paid in full as costs and expenses of administration.

2. Whether an executory collective bargaining agreement may be rejected by the Trustee without compliance with the provisions of Section 313(1) of the Bankruptcy Act.

Statutes Involved

In addition to the relevant statutory provisions cited in the petition, Section 313(1), 11 U.S.C. §713(1), omitted by Petitioners provides, in part, as follows:

> §713. Same; administration of estate
>
> Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter—
>
> (1) permit the rejection of executory contracts of the debtor, upon notice of the parties to such contracts and to such other parties in interest as the court may designate; . . .

Statement of the Case

W.T. Grant (hereinafter "Grant"), was engaged in the business of operating a nationwide chain of retail outlets. On or about October 2, 1975, Grant filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (hereafter "Act"), 11 U.S.C. §722. In accordance with an order dated April 13, 1976, Grant was adjudicated bankrupt.

Prior to the Chapter XI proceedings, Grant operated over 1,000 retail outlets. Some of its employees were covered by approximately 53 collective bargaining agreements with approximately 14 local unions affiliated with the Retail Clerks' International Association (hereinafter

"RCIA"). The great majority of employees, however, were not subject to collective bargaining agreements but rather, as non-union employees, were subject to the Grant's Store Manual, the New York Office Supervisor's Personnel Manual and the District Manager's Guide To Termination Policy And Procedure.

While the language contained in the 53 collective bargaining agreements may differ, the agreements provide for severance pay only upon termination of employment. Severance pay is not payable unless and until the employee is permanently terminated through no fault of his own, such as a layoff for lack of work or a store closing. Thus, if an employee quits, no severance pay is due. The various collective bargaining agreements provide for different severance pay benefits and different eligibility requirements. The amounts due employees are computed by specific formulae, generally predicated on length of continuous service with Grant. The severance pay benefits are not vested. Indeed, regardless of the years of service rendered, employees who quit or are terminated for cause have no right to severance pay.

At no time during the proceedings under the Bankruptcy Act did the debtor-in-possession or the Trustee make any application pursuant to Section 313(1) of the Act, to reject any of the executory collective bargaining agreements between Grant and the various RCIA locals. Nor was any attempt made to renegotiate any of the terms and conditions contained in those agreements. In fact, the Trustee agrees that those former employees who were terminated during the course of the Chapter XI proceedings as a result of permanent layoffs and store closings are entitled to severance pay. The RCIA contends that under the terms of the applicable agreements the Trustee is responsible for payment of severance pay benefits *in full* to covered employees.

The position of RCIA is that severance pay is not "earned", nor is it apportionable as the Trustee contends. As discussed below, severance pay has been defined and is payable as compensation for the termination of employment.

By application to the Bankruptcy Court dated May 10, 1977, the Trustee sought instructions as to the disposition of the claims for severance pay benefits. The Bankruptcy Court held that the "severance" pay claimed by each former employee of Grant who was terminated during the Chapter XI proceedings should be paid in full as costs and expenses of administration under Section 64a(1) of the Act.

On July 19, 1979, the District Court affirmed the order of the Bankruptcy Court. Judge Kevin T. Duffy held that severance pay benefits guaranteed under collective bargaining agreements are not to be construed as wages and are, therefore, not divisible. Absent a rejection of the executory collective bargaining agreements by the Trustee, these claims are entitled to a priority as costs and expenses of administration.

On January 3, 1980 the Court of Appeals unanimously affirmed the decision of the District Court. That Court held that the Trustee was bound by executory employment contracts permitting employees to continue in its employ after it entered Chapter XI since the Trustee never rejected those collective bargaining agreements pursuant to Section 313(1) of the Act. Consequently, the claims arising from these collective bargaining agreements, are entitled to priority as costs and expenses of administration. (Section 64a(1) of the Act.) The Court followed the well settled rule in the Second Circuit that severance pay benefits provided under a collective bargaining agreement are not to be construed as wages.

REASONS FOR DENYING THE PETITION

I.

There Is No Conflict Among the Courts of Appeals on the Issue of the Status of Severance Pay as an Administrative Expense Under the Bankruptcy Act of Sufficient Significance to Warrant This Court's Review of the Decision Below

Petitioners' assertion that a conflict among the Court of Appeals justifies review of the decision in this case is narrowed when stripped of extraneous obfuscatory arguments.

Although the First, Second and Third Circuits have followed similar approaches pertaining to matters in the administration of debtor's estates under the Bankruptcy Act, particularly in matters which pertain to the resolution of labor disputes during the administration of an estate, it cannot be denied that there exists a difference in approach confined to a narrow issue of law. These Circuits agree that persons employed during the administration of an estate do confer valuable services. Further, they agree that claims arising during the administration are entitled to payment in full as an expense of administration. The sole narrow issue that divides the Circuits is whether severance pay claims of employees terminated during the administration, calculated according to the total length of service with the bankrupt, are entitled to payment in full as costs and expenses of administration. *Compare In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1970) and *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir. 1947) *with Straus-Duparquet, Inc.* v. *Local Union No. 3, I.B.E.W., AFL-CIO*, 386 F.2d 649 (2d Cir. 1967) and *In re Unishops, Inc.*, 553 F.2d 305 (2d Cir. 1977).

The Second Circuit in *Straus-Duparquet, supra,* held that employees terminated during the administration of the bankrupt's estate, are entitled to the full amount of severance pay as an expense of administration. The facts in *Straus-Duparquet, supra,* and those in the case at bar, are strikingly similar. In both cases, employees were covered by collective bargaining agreements which provided for severance pay. Employees of both companies were terminated subsequent to the filing of petitions under Chapter XI of the Act. The court in *Straus-Duparquet, supra,* relied solely upon the definition and nature of severance pay as a form of compensation for termination; only those employees terminated as the result of a limited event were eligible for this one time benefit. Unlike vacation pay, severance pay does not accrue and cannot be apportioned.

In an earlier decision, the Fifth Circuit, held that ". . . the right to the severance wages arose only in the happening of the contingency specified in the contract". *McCloskey* v. *Division of Labor Enforcement, Department of Industrial Relations, California,* 200 F.2d 402 (5th Cir. 1952). *See also In Re Elliot Wholesale Grocery Co.,* 98 F.Supp. 1017 (S.D. Cal. 1951) where the court stated:

> So the severance pay is not earned, as the Trustee argues, at the time the contract of employment is entered into but at the time the week's notice is due . . .
>
> 98 F. Supp. at 1019

Recently, in *In the Matter of Unishops, Inc., supra,* the Second Circuit reaffirmed its holding in *Straus-Duparquet, supra.* Refusing to classify "severance" pay as "wages", the court defined severance pay as it is, i.e., "as compensation for termination of employment." 553 F.2d at 305, 308 n.3. Severance pay is a cost and expense under §64a(1) when termination occurs during administration.

Similarly, the Sixth Circuit in *In re Ad Service Engraving Co.,* 338 F.2d 41 (6th Cir. 1964), refused to classify severance pay as "wages earned"; rather such benefits were deemed damages and entitled to be treated as a cost and expense of administration.

The Trustee relies exclusively on two cases, *Mammoth Mart, supra,* and *Public Ledger, supra,* claiming that severance pay benefits must be allocated in the same manner as wages under Section 64a of the Act. In each decision, the court relied upon the facts of the individual case in resolving the question of priority treatment of severance pay as an expense of administration.

In *Mammoth Mart,* 536 F.2d at 955, the court held that employees terminated during the corporate reorganization had already received severance benefits and were not entitled to further severance benefits. In a footnote, the court stated:

> Where, as here, the claims are based upon a contract which the debtor-in-possession has neither rejected nor expressly affirmed, it is not clear whether the amount of the priority will be determined by the contract price or by the reasonable value of the services that have been provided. . . . Given our holding today, we need not take a position on this question.

Mammoth Mart 536 F.2d at 954 n.3. In short, the First Circuit simply did not address the issue presented here regarding the rejection or assumption of a contract nor, in confining its decision to the facts of that case did the court reach the question of the method of computing the amount of severance pay as it arose in the instant case.

Although in *Public Ledger,* 161 F.2d at 771, the Third Circuit erroneously classified severance pay under one

collective bargaining agreement as wages and treated claims thereunder as any other wage claim, that court also held, that lump sum severance benefits under another collective bargaining agreement were costs and expenses of administration entitled to payment in full.

The petition does not raise significant differences in approach by the several circuits cited regarding the status of severance claims arising under collective bargaining agreements warranting the grant of certiorari.

II.

There Is No Conflict Among the Circuits as to the Rejection or Assumption of Executory Contracts

The Trustee's contention that certiorari should be granted to review the Second Circuit decision binding him to the collective bargaining agreement absent an express order of the bankruptcy court is wholly without merit. As the court below recognized, only formal rejection pursuant to §313(1) of the Bankruptcy Act, 11 U.S.C. §713(1) (1976), is sufficient to disaffirm an executory contract.

In the present case, neither the debtor-in-possession nor the Trustee petitioned the Court for permission to reject the collective bargaining agreements as required by Section 313(1) or the Bankruptcy Act.

Section 313(1) of the Bankruptcy Act provides that the Court may:

> . . . permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate . . . .

The Trustee would have the Court completely ignore not only the requirements of Section 313(1) but its very existence. He suggests that it is not necessary to formally reject Grant's collective bargaining agreements with the RCIA. Without any statutory basis or other authority, the Trustee insists that *in futuro*, it *may* determine such agreements shall be continued, modified or ignored.

Had a petition been made to reject the collective bargaining agreements pursuant to Section 313(1) of the Act the Trustee or debtor-in-possession would nevertheless have had to meet the recognized test for rejection: that the collective bargaining agreements were onerous and burdensome. *See, Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, AFL-CIO* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017, 1073 (1975, 1976); *Shopmen's Local Union No. 455, Int'l. Ass'n. of Bridge, Structural and Ornamental Iron Workers, AFL-CIO* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975); *Local Joint Executive Board, AFL-CIO* v. *Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980); *Matter of Alan Wood Steel Co.*, 449 F.Supp. 165 (E.D. Pa. 1978) *appeal dismissed*, 595 F.2d 1211 (3d Cir. 1979).

The cases relied upon by the Trustee,* holding that assumption of an executory contract requires an express order, are distinguishable from this case for at least two reasons. First, those cases involved reorganizations arising under Chapter X of the Act, an entirely separate and different statutory scheme than that of Chapter XI. Sec-

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* *In re Gulfco Investment Corp.*, 520 F.3d 741 (10th Cir. 1975); *In re Maryvale Community Hospital, Inc.*, 456 F.2d 414 (9th Cir.), *cert. denied*, 409 U.S. 879 (1972); *In re American National Trust*, 426 F.2d 1059 (7th Cir. 1970); *Texas Importing Co.* v. *Banco Popular de Puerto Rico*, 360 F.2d 582 (5th Cir. 1966).

ond, in *Gulfco, Maryvale* and *American National Trust, supra,* the Trustees *had filed* a petition either to reject or assume the executory contracts during the period of reorganization. The decision in *Texas Importing Co., supra* which involved a dispute challenging an order approving a plan of reorganization of a lessee, was expressly limited to reorganizations under Chapter X of the Bankruptcy Act. The formal applications were then scrutinized by the bankruptcy court and decisions rendered thereon.

The Trustee's reliance upon the above cases begs the issue in this case: the status of executory collective bargaining agreements where the non-bankrupt party has fully performed, the Trustee has accepted performance and the benefits thereof and has never filed a petition to reject.

The Trustee also improperly relies upon the decision of the Ninth Circuit in *Hotel Circle, supra,* which required the Trustee to petition the bankruptcy court for an express order for either the assumption or the rejection of the executory collective bargaining agreement. In that case, the representatives of a receiver continued to employ workers under a collective bargaining agreement, voted to accept a proposed wage increase and extended the life of that agreement. Four months later, the receiver applied for an order authorizing the sale of the hotel and filed a motion seeking to reject the agreement. The bankruptcy court granted the application. The Ninth Circuit found that the debtor-in-possession could reject the collective bargaining agreement under the Second Circuit test established in *REA Express, supra,* and *Kevin Steel, supra.* Here, the Trustee seeks to avoid the formal rejection requirements of Section 313 including, the Second Circuit test for rejection, thereby disrupting the statutory scheme.

The Trustee's reliance on *Nathanson* v. *National Labor Relations Board,* 344 U.S. 25 (1952) to bolster its argument is misplaced. *Nathanson, supra,* teaches that no claimant should get more than that to which he is entitled. It does not answer the question of what severance pay benefit is due to claimants in this case, nor does it address the issue of conflict in decisions among the Circuits. In the instant case, equality of distribution requires that the severance benefit claims be allowed in the full amount due under the agreement.

The Bankruptcy Reform Act of 1978, 92 Stat. 2549, 11 U.S.C. 101 et seq., (1978) (hereinafter "Bankruptcy Code") has absolutely no application to this case; nowhere does the Second Circuit suggest that its decision implicates the Bankruptcy Code. To the contrary, the decision in this case focuses upon the construction of the Bankruptcy Act holding that, "only a formal rejection pursuant to §313(1) is sufficient to reject the executory collective bargaining agreement." [Jt.App. 6a] The Court below was concerned only with a claim as an expense of administration during a Chapter XI reorganization under the Bankruptcy Act and did not contemplate a hypothetical case arising under the Bankruptcy Code.

III.

The Opinion of the Second Circuit Gave Full Consideration to the Issues Presented and Decided Them Correctly

The Second Circuit applied well-established principles to undisputed facts and determined that Grant never rejected the executory contracts of its employees pursuant to the formal requirements of Section 313(1) of the Bankruptcy Act. Rather, Grant received substantial benefits under these contracts by permitting the workers to continue their employment in an effort to rejuvenate the failing enterprise.

The benefit received by Grant was retention of an experienced work force familiar with its stores, its stock, its customers and its procedures. Those employees chose to stay, in consideration of, among other things, continued employment in a successfully rehabilitated corporation. They did not abandon their employment and seek employment with employers offering a more promising future. Could Grant have had any reasonable expectation that it would survive if its rank and file employees quit, requiring the recruitment and training of a new work force? If that had occurred, it would certainly have sounded the death knell of Grant.

The Trustee claims that under the decisions of *Kevin Steel, supra,* and *REA, supra,* Grant, as debtor-in-possession, was a new juridical entity which did not assume the existing collective bargaining agreements and, therefore, was not bound to comply with its terms.

The Trustee's logic is faulty in several respects. First, his position is inconsistent with his admission that severance benefits under the collective bargaining agreements are due, but that computation should not be made as provided therein. Additionally, *Kevin Steel, supra,* does not insulate the Trustee, or debtor-in-possession, from the duty to bargain imposed by Section 8(d) of the Labor Management Relations Act, as amended, 29 U.S.C. §158(d). Here, neither the debtor-in-possession nor the Trustee initiated or engaged in any collective bargaining negotiations with the RCIA regarding any changes in the terms and conditions of employment, including severance pay benefits.

Moreover, in *Kevin Steel, supra,* and *REA, supra,* the debtor-in-possession and the Trustee, respectively, followed the statutory requirements of Section 313(1) of the Act in an effort to reject the collective bargaining agreements. Significantly, on remand, District Judge Wyatt, in *REA,* 75 B 253 (1976), approved rejection of the collective bargaining agreement with one union, finding it onerous and burdensome; however, he did not approve the rejection of the collective bargaining agreement with another union, even though the debtor was a "new juridical entity."

Similarly inapposite is *In re Godwin Bevers Co., Inc.,* 575 F.2d 805 (9th Cir. 1978), cited by the Trustee for the proposition that claims which have matured prior to the bankruptcy proceedings are provable against the estate. In *Godwin, supra,* the court concluded that the agreement with the claimant was not executory; all that remained to be performed was for the bankrupt to be paid. In the instant case, the Trustee erroneously contends that severance pay should be apportioned over the several time periods under the Act which relate to the employees' service to the bankrupt. Hence any service performed prior to the Chapter XI proceeding should be treated either as a priority claim

under Section 64a(2) or as a general unsecured claim. If that were the case, an employee who quit after the filing of the petition under the Act should be entitled to prove a portion of a severance pay claim for his service prior to such filing. That result would be inconsistent with the concept of severance pay, since the "contingency" about which the Trustee is concerned has not occurred, i.e., an involuntary loss of employment.

Indisputably, the severance pay claims due under the RCIA collective bargaining agreements are "earned" only when employees are permanently and involuntarily terminated or laid off; they simply do not accrue. Therefore, employees terminated or laid off during the period of administration are entitled to have their claims treated as administration expenses and paid in full in amounts computed in accordance with the applicable agreements.

IV.

The Issue Submitted by the Petitioner Concerning Section 70(b) of the Bankruptcy Act Is Not Applicable

Section 70(b) of the Bankruptcy Act, 11 U.S.C., §110(b), which provides for the automatic rejection of executory contracts not otherwise acted upon by the Trustee within sixty days does not apply in this case. The definition of "executory contract" in the context of this section excludes a contract to which the non-bankrupt party has fully rendered his performance, and the bankrupt party has performed partially or not at all. *Jenson* v. *Continental Financial Corp.*, 591 F.2d 477 (8th Cir. 1979); *In the Matter of Chicago, Rock Island and Pacific Railroad Company*, 604 F.2d 1002 (7th Cir. 1979); *Northwest Airlines, Inc.* v. *Klinger*, 563 F.2d 916 (8th Cir. 1977); 4A Collier on Bankruptcy Section 70.43(2) at 522 (14th ed. 1976). In this case, the employees of Grant fully performed their obligations under the collective bargaining agreement. They were employed until permanently terminated during the period of administration while the Trustee attempted to rejuvenate the enterprise. It would be absurd to suggest that the contract was automatically rejected as of the filing date of the petition in bankruptcy. Such a conclusion would render Section 313 superfluous.

Having failed to make an application to reject, and having accepted the services of employees and received the benefits of their continued employment, the Trustee should not be heard to argue that the contract was never assumed.

CONCLUSION

The Second Circuit Court of Appeals correctly determined that the debtor was bound by the executory collective bargaining agreement since it received benefits thereunder and never petitioned for a formal rejection pursuant to Section 313(1) of the Act. Valid reasons exist for a denial of the writ of certiorari. There is no conflict among the Circuits as to the rejection and assumption of executory contracts. There is no substantial issue presented as to the priority status of a severance pay claim as ar administrative expense. For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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